RECORD AND BRIEFS

In The
Supreme Court of the United States

JAMES W. ZIGLAR,

Petitioner,

v.

AHMER IQBAL ABBASI, *et al.*,

Respondents,

JOHN D. ASHCROFT AND ROBERT MUELLER,

Petitioners,

v.

AHMER IQBAL ABBASI, *et al.*,

Respondents,

DENNIS HASTY AND JAMES SHERMAN,

Petitioners,

v.

AHMER IQBAL ABBASI, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF PROFESSORS OF CIVIL PROCEDURE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

This brief is written on behalf of a group of law professors who teach and write in the areas of Civil Procedure and Federal Courts. *See* Appendix (listing *amici*). Although we conclude that respondents have adequately pled a claim upon which relief can be granted, our principal focus is not on the merits of this case, but on the procedural standards used to assess the legal sufficiency of a pleading. Our goal is to promote a coherent and workable system of pleadings that is consistent with the Federal Rules of Civil Procedure and with this Court's precedents interpreting those rules.[1]

SUMMARY OF ARGUMENT

Under Federal Rule of Civil Procedure 8(a)(2), as interpreted by this Court, a plaintiff is required to plead facts that plausibly suggest a claim upon which relief can be granted. The plausibility standard does not require particularity; nor does it require facts sufficient to state a cause of action. Rather plausibility requires non-conclusory factual allegations that *suggest*

[1] Petitioners and respondents have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. Loyola Law School, Los Angeles, California, paid the cost of printing and filing this brief. No other person or entity made any monetary contribution to the preparation and submission of this brief.

liability, i.e., factual allegations that are not merely consistent with liability but that are positively charged toward a finding of liability. The Petitioners, including the United States, argue that plausibility pleading requires a district court to weigh potential inferences drawn from the non-conclusory facts and to credit only the one inference the court deems to be the more likely. This proposed standard would require lower federal courts to engage in a type of pre-discovery fact finding that is akin to summary judgment and unwarranted by the rules and this Court's precedents. Indeed, the standard endorsed by the Petitioners would create a pleading system stricter than that followed in code-pleading jurisdictions.

ARGUMENT

Introduction. In each of these three consolidated cases, this Court granted certiorari on three questions, the first pertaining to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the second to qualified immunity, and the third to pleading. This brief addresses the pleading question, which essentially asks whether specified claims in the Respondents' Fourth Amended Complaint satisfy the "short and plain statement" requirement of Federal Rule of Civil Procedure 8(a)(2). The resolution of that question depends on the scope of Rule 8(a)(2)'s pleading standard and on the application of that standard to the specific claims now at issue. In our view, the

Court of Appeals applied the correct pleading standard correctly.

This case has been stuck in the groove of pre-trial motions from its inception. Thirteen years. One can safely surmise that had the matter gone to discovery, it would have long ago settled or have been resolved on the merits one way or another. Focusing now on the pleading question alone, it must be kept in mind that pleadings are the essential first step in the processing of a plaintiff's claim. They are the gateway to the federal judicial system. Anyone who has studied the matter knows that law of pleadings under the Federal Rules of Civil Procedure was meant to impose minimal requirements of notice and factual particularization. The idea was to avoid battles over the pleadings and to process claims through the rules. Discovery was understood to be a valuable process to determine the actual facts necessary to assess the plaintiff's claim. The rules were meant to promote that possibility. Of course, the complexity of federal law and civil litigation has grown since the adoption of the original federal rules and some adjustment of those rules can be expected as a product of that evolution. But any such adjustment should be sensitive to the underlying principle that pleadings are meant to initiate a lawsuit, not resolve it. We must also keep in mind that without access to a fair and efficient system of procedure to enforce rights, there is no justice. Indeed, there are no rights.

1. The Scope of the Rule 8(a)(2) Pleading Standard. As is well established, Rule 8(a)(2) endorses a simplified, pragmatic pleading standard, one that is to

be contrasted with the more formalistic approach used in code-pleading systems. *See Advisory Committee Report of October, 1955 on Rule 8(a)(2).* In the words of Judge Charles E. Clark, a key force in the drafting and adoption the original Federal Rules, "[u]nder the new rules of civil procedure, there is no pleading requirement of stating 'facts sufficient to constitute a cause of action,' but only that there be 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Dioguardi v. Durning*, 139 F.2d 774, 775 (2nd Cir. 1944).

The distinction drawn by Clark tells us what the short-and-plain-statement standard *isn't* – it isn't code pleading. It is a little more difficult, however, to say what that standard *is* without straying into verbal abstractions. The sample complaints in the Appendix of Forms, which accompanied the original federal rules, were designed to overcome that difficulty by providing "pictures" of complaints deemed satisfactory under the Federal Rules.[2] Thus, despite their recent abrogation, the forms give us an idea of what the drafters of the federal rules had in mind when they adopted the short-and-plain-statement standard. Consistently with those illustrations, Rule 8(a)(2)'s pleading standard should be satisfied if the complaint provides a factual context that particularizes the claim from other matters and gives the defendant fair notice of the grounds

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[2] *See* Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958) (describing the forms as "pictures" that portrayed the meaning of Rule 8(a)(2)).

on which the plaintiff seeks relief.[3] This, of course, is quite different from the more formal code-pleading requirement that the plaintiff provide a statement of facts constituting a specified cause of action.

This Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), clearly endorsed a more fact-intensive approach to pleading than the one envisioned by the drafters of Rule 8(a)(2). Neither opinion, however, purported to extinguish the fundamental distinction between simplified pleading and code pleading. *See Twombly*, 550 U.S. at 557; *Iqbal*, 556 U.S. at 677-678; *see also Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (citing *Twombly* as establishing a "fair notice" standard). Hence, post-*Twombly-Iqbal*, we can still say with some certainty that the short-and-plain-statement standard *isn't* code pleading. But, given *Twombly* and *Iqbal*, what is it?

The key case is *Iqbal*. The question there was whether the plaintiff's complaint adequately alleged claims of intentional discrimination against two high government officials. *Id.*, at 669. The *Iqbal* Court proposed a specific framework through which to measure the adequacy of a complaint: identify the substantive elements of an identified right of action, *id.*, at 675-677; accept as true all non-conclusory factual allegations in the complaint and all reasonable inferences drawn therefrom, *id.*, at 678-679; and determine whether the

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[3] *See, e.g.*, FED. R. CIV. PROC. Form 9 (negligence) (1938); *see* Clark, *Pleading Under the Federal Rules*, supra, note 1, at 183.

non-conclusory factual allegations "plausibly suggest" a claim for relief, *id.*, at 681.[4]

As to the final step, the *Iqbal* Court instructed:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Id., at 678 (internal citations omitted). The quotation is a bit opaque. Clearly, however, "plausibility" is the key, and the Court locates plausibility somewhere between "probability" and "sheer possibility." The former is *not required* since probability requires a weighing of

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[4] The *Iqbal* Court's mechanical distinction between conclusory and non-conclusory allegations, under which only the latter are credited in the assessment of a pleading's adequacy, is troubling to the extent that it erects a substantial barrier to the resolution claims that require the plaintiff to establish the defendant's state of mind. Typically, such state-of-mind information is of a type over which there is an asymmetry of access that strongly favors the defendant. There is no argument in these cases, however, that the Court of Appeals relied on conclusory allegations.

facts, which would be inappropriate at the pre-discovery pleading stage of a case. A sheer possibility, on the other hand, is *not sufficient* since it is premised solely on a coincidental consistency with liability. Such a coincidental consistency is essentially agnostic on the question of liability. In the Court's view, it generates nothing more than untethered speculation on the remote possibility that liability can be established. Plausibility, on the other hand, requires the pleading of facts that are positively *suggestive* of liability. They are not neutral on the question of liability, but affirmatively support such a finding. Such facts move the possibility of liability from the realm of speculation into the realm of reasonable inquiry.

In *Iqbal*, the Court identified the plaintiff's rights of action as premised on various forms of invidious discrimination, all of which required a showing of discriminatory purpose. *Id.*, at 669, 676. After identifying that common element, the Court focused on the nonconclusory factual allegations in the complaint to see whether any of them were suggestive of purposeful discrimination. The Court concluded that there were *no such allegations*. "[T]he complaint does not show, *or even intimate*, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.*, at 683 (emphasis added). Hence, while the

plaintiff's factual allegations were certainly consistent (or merely consistent) with the possibility of a discriminatory purpose, that consistency was coincidental and offered no basis from which to move the complaint beyond speculation.

The plausibility standard does nudge federal pleading practice away from classic simplified pleading by discounting conclusory allegations and by insisting that the complaint include non-conclusory factual allegations supportive of each element of the right of action at issue. We might dispute that move, but it has been made and it is part of our jurisprudence. It should not, however, be read as an evisceration of Rule 8(a)(2) or as an endorsement of code pleading. Certainly the Court did not purport to do either, and the Court's insistent use of the phrase, "plausibly suggests," is far less demanding than the more rigid "facts constituting a cause of action." We should assume that the Court's use of the word "suggests" (and all its variations) was purposive and designed to conform to the general concept of simplified pleading as being less demanding than code pleading.

Consistently with the foregoing, the critical difference between simplified pleading (as modified by *Iqbal*) and code pleading is that the latter is both more formal and more fact-intensive. In essence, code pleading requires allegations of fact that align with each element of a cause of action and that, if proved at trial, would entitle the plaintiff to relief. Simplified pleading, on the other hand, requires allegations of fact that move the question of potential liability from the realm

of pure speculation (mere consistency with liability) and into what we might call the realm of reasonable inquiry (plausibly suggestive of liability). This small but important distinction treats federal pleading as distinct from code pleading and as part of an entire system of procedure, rather than as a stand-alone provision that operates as a formal preclearance requirement. Most importantly, it gives district court judges the ability to exercise judgment in determining whether and to what extent a complaint is sufficient to proceed to the discovery phase of litigation, that is, so long as the complaint is something more than an exercise in pure conjecture. In the *Iqbal* Court's words:

> Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not "show[n]" – "that the pleader is entitled to relief."

Id., at 679 (citation omitted). Thus, under *Iqbal*, district courts are tasked with the context-specific obligation of determining whether the "plausibly suggests" standard has been satisfied. There is, however, a minimal requirement of some facts suggestive of liability, i.e., of some facts that can be rationally understood as moving the claim from a coincidence between the facts and liability to one in which the facts positively suggest, but do not necessarily establish, liability.

The Court of Appeals appears to have understood the above-described standard:

> To satisfy *Iqbal*'s plausibility standard, Plaintiffs must "plead . . . factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Although plausibility is not a "probability requirement," Plaintiffs must allege facts that permit "more than a sheer possibility that a defendant has acted unlawfully." Factual allegations that are "merely consistent with" unlawful conduct do not create a reasonable inference of liability.
>
> Moreover, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Well-pleaded factual allegations, in contrast, should be presumed true, and we must determine "whether they plausibly give rise to an entitlement to relief." Ultimately, every plausibility determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense."

Turkmen v. Hasty, 789 F.3d 218, 233 (2d Cir.), *rehearing denied*, 808 F.3d 197 (2015) (internal citations omitted). The only question, therefore, is whether that court correctly applied this "context-specific" standard.

The Government invites a more aggressive approach to the assessment of pleadings. Petitioner's Brief, No. 1359, at 42-43. It suggests that *Iqbal* requires lower federal courts to discount a plaintiff's

allegations whenever there are "more likely explanations" for the challenged conduct. Rather than presuming the truth of those allegations, the Government would prefer that a court credit the "obvious alternative explanation." It arrives at this position by positing that the conclusory allegations in *Iqbal* were deemed "implausible" because the Court thought that there were "more likely explanations" for the challenged policy. But the Court's reference to a "more likely explanation" occurred only after it had concluded that the non-conclusory allegations in the *Iqbal* complaint did not even "intimate" a discriminatory purpose. *Iqbal*, 556 U.S. at 683. The Government's free-floating invitation to permit lower federal courts to search for the "more likely" or the more "obvious alternative" invites a type of pre-discovery fact determination that would operate more like a summary judgment than it would an assessment of the pleadings. Essentially, the Government wants a standard that forces the weighing of competing inferences, under which only the most likely survives. Nothing in *Iqbal* endorses such an aggressive approach to pleadings. Indeed, what the Government suggests would take simplified pleading well beyond the requirements of code pleading. *See also* Petitioner's Brief, No. 1363, at 46-57 (relying heavily on an obvious-and-more-likely theory of pleading); Petitioner's Brief, No. 1358, at 23, 27-28 (incorporating the Government's argument).

In short, we believe that it is inarguable that the Court of Appeals described and applied the correct pleading standard, one that preserves simplified

pleading as a method distinct from its more formal code-pleading counterpart.

2. Application of the Standard. We expect that the Respondents will provide a detailed defense of the Court of Appeals fact-specific application of the Rule 8(a)(2) standard. We will, therefore, limit our discussion here to two points of law that we find particularly troubling in the Government's brief and to a point of principle that we deem of overarching significance.

In its brief, the Government uses the word "conclusory" as a catch-all pejorative designed to discount the legitimacy of inferences drawn from the plaintiffs' factual allegations by the Court of Appeals. Petitioner's Brief, No. 1359, at 45, 48. That is an improper use of a term of art. For purposes of pleading, we understand a conclusory allegation to be one that merely replicates a legal standard without factual elaboration, as in "the defendant acted with invidious intent." Certainly that is how the phrase was used in both *Twombly* and *Iqbal*. The Government's Brief points to no such conclusory allegation. The habitual use of the word "conclusory" to cover all factual allegations or inferences with which one disagrees is both unhelpful and misdirected. Every factual allegation and every inference drawn therefrom represents a conclusion, but not every factual allegation or inference is conclusory. Any validation of the Government's use of the term will add a confusing complexity to federal pleading practice and to the judicial assessment of the adequacy of a pleading.

Similarly, the Government demands that the inferences drawn by Court of Appeals be the ones the Government would credit as "likely," echoing its earlier invocation of a most-likely-explanation standard. But there is no such requirement. Rather, as the *Iqbal* Court recognized, "the reviewing court [must] draw on its judicial experience and common sense" in determining whether the allegations *plausibly suggest* an inference of liability. *Iqbal*, 556 U.S., at 679. And, as the Court in *Twombly* observed, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and *unlikely*." *Twombly*, 550 U.S., at 556 (internal quotations omitted) (emphasis supplied). We fear that the Government's zealous advocacy may have led it to endorse a dangerously aggressive form of pleading analysis, one that runs directly against this Court's admonition in both *Twombly* and *Iqbal* that it was not imposing a probability requirement. *Twombly*, 550 U.S., at 556; *Iqbal*, 556 U.S., at 678.

Finally, this case involves the drawing of inferences from non-conclusory allegations said to be plausibly suggestive of liability. We doubt that this Court can devise a verbal formula that is superior to its recognition that plausibility is context-specific and that its determination is best left to the judicial experience and common sense of lower federal courts. Certainly, the Petitioners have offered no doctrinal method through which to determine the reasonableness of the challenged inferences other than through

their misuse of the "conclusory" *ipse dixit*. We think the Court should leave its deferential standard intact.

3. The Relationship Among the Issues Presented on Certiorari. The pleadings issue presented in this case cannot be wholly separated from the *Bivens* and qualified immunity issues raised by the Petitioners. These seemingly separate doctrinal categories do not operate in a vacuum. They operate dynamically within the system of the Federal Rules. That system was premised on a specific idea of "the claim" as being an operative set of facts giving rise to one or more rights of action.[5] The function of the federal rules was to process such claims through a careful examination that would require a full development of the facts. Only in this manner can we know the rights that arise out of those facts. To this extent the operation of the rules of pleading and discovery were inextricably intertwined and essential to the fair assessment of the claim. They provided method through which the claim could be known.

The Petitioners argue that "special factors" counsel against the recognition of a *Bivens* action in the context of high-level policy decisions that implicate national security and immigration. Petitioner's Brief, No. 15-1359, at 18-30. Essentially, they ask this Court to treat claims arising in such circumstances as political questions not susceptible of judicial review. This is a

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[5] See Simona Grossi, *A Principled Approach to Procedural Reform: Zooming in the Claim*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2851185.

bold move and particularly so at the pleading stage when the facts are not fully developed and the scope rights arising out of those facts remain obscure.

This Court cannot know whether "special factors" counsel against recognition of a *Bivens* action unless it knows the full story of the "new context" from which those special factors are said to arise. Indeed, that story might reveal a pressing need to provide a remedy for systemic, policy-driven initiatives that willfully ignore established constitutional rights.

The same can be said for a premature validation of a qualified immunity defense. Whether the defendants acted in objective good faith can only be determined if a court knows the how and why of the defendants' actions. We recognize the value of making the qualified immunity determination as early as possible in the litigation process, but that value does not outweigh the value of deciding cases based on the actual facts. A presumed set of facts is no substitute for reality. To resolve either of these questions on an incomplete or presumed version of the facts, would be reminiscent of this Court's unfortunate decision in *Korematsu v. United States*, 323 U.S. 214 (1944), where the true facts did not emerge until decades later.

CONCLUSION

We believe the wisest course of action is to dismiss these writs as improvidently granted and to allow the district court to oversee discovery under Federal Rule

of Civil Procedure 26(b)(1), including the recently adopted proportionality standard.

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